

**LETTER OPINION**  
**96-L-6**

January 22, 1996

Mr. Allen Koppy  
Morton County State's Attorney  
210 2nd Avenue NW  
Mandan, ND 58554

Dear Mr. Koppy:

Thank you for your letter forwarding several questions of the Morton County Board of Commissioners (Board) regarding a joint powers agreement, a copy of which you have provided.

You indicate that the Morton County Register of Deeds would like to join a multi-county land records management "group" established by a joint powers agreement between several other North Dakota counties in a cooperative effort to use computer technology to improve the management of land records.

The Board first asks whether it can assign its authority to enter into joint powers agreements to another county official.

"Any county, city, township, city park district, school district, or other political subdivision of this state, upon approval of its respective governing body, may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them. . . ."

N.D.C.C. § 54-40.3-01 (emphasis added). Under the plain meaning of this statute, a political subdivision has no authority to enter into a joint powers agreement unless it is first approved by the political subdivision's governing body. Morton County's governing body is the Board of County Commissioners. See N.D.C.C. ch. 11-11. There is no statutory authority for the Board to assign its approval authority. See Letter from Attorney General Nicholas Spaeth to Vern Thompson (July 5, 1989) (non-home rule city may not assign statutory duties). Therefore, it is my opinion that the authority to decide whether to

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enter into joint powers agreements under N.D.C.C. ch. 54-40.3 may only be exercised by the Board and cannot be assigned to another county official. N.D.C.C. § 54-40.3-01 contemplates a governing body's decision to enter into a joint powers agreement and approval of its terms. "Approval" under the statute does not require that a governing body member actually sign the agreement itself. See Black's Law Dictionary, 102 (6th ed. 1990).

The Board next asks whether it can pay county funds "to a Nonprofit Corporation whose purpose is to develop a Land Records Program that may be sold to counties at a profit and have no control or accountability" over that corporation once the funds are paid. The Board also asks whether it may use nonprofit corporations "to do projects that are outside of General Functions of Government."

Political subdivisions are creatures of state law and possess only those powers that are expressly granted by statute or may be necessarily inferred from those expressly granted. N.D. Const. art. VII, § 2; County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985). Counties generally may engage in any enterprise or business that is specifically authorized by law, so long as public funds are used for a public purpose. N.D. Const. art. X, § 18; Green v. Frazier, 176 N.W. 11 (N.D. 1920), aff'd 253 U.S. 233 (1920); Letter from Attorney General Heidi Heitkamp to Fabian Noack (August 10, 1995). Any county enterprise or business, if authorized by law, could accurately be described as a function of county government.

The Land Records Management Group (Group) is not accurately described by the Board in its questions. The Group is not a nonprofit corporation, but is a separate governmental entity created under N.D.C.C. § 54-40.3-01(1)(c) to be "responsible for administering the cooperative or joint undertaking." Under the terms of the agreement, the Group is composed of the registers of deeds for the counties that are parties to the agreement. According to its "bylaws," the Group was created by these counties for the purpose of developing "nonprofit automation capabilities in the Register of Deeds." (Emphasis added).

Except for certain specific powers that cannot be delegated, N.D.C.C. § 54-40.3-01 authorizes this type of cooperative effort between political subdivisions for any power belonging to at least one of the parties to the agreement. See 1994 N.D. Op. Att'y Gen. L-258. State law expressly requires county registers of deeds to manage the land records for their county. N.D.C.C. § 11-18-01. Necessarily included in this authority is the power to improve the management of these records, including computer automation. Consequently, just as county

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registers of deeds could develop ways of automating the management of land records for their own county, a multi-county effort to automate the management of these records could properly be the subject of a joint powers agreement. N.D.C.C. § 54-40.3-01. It is therefore my opinion that the Board could spend county funds to support this multi-county effort if it was a party to the agreement. N.D.C.C. § 54-40.3-01(1)(d). It is my further opinion that the improvement of the management of land records by the county register of deeds through computer automation would be a general function of county government.

Finally, the Board asks whether it can contract with a nonprofit corporation to compete with private business. As discussed above, the Group is not a nonprofit corporation, and political subdivisions may engage in any enterprise authorized by law so long as public funds are used for a public purpose. See Letter to Fabian Noack, supra, quoting N.D. Const. art. X, § 18. The current language of Article X, Section 18 (formerly Section 185) was adopted to create "a new governmental function - that of engaging in and carrying on commercial and industrial enterprises theretofore considered as private, in competition with private business." Egbert v. City of Dunseith, 24 N.W.2d 907, 909 (N.D. 1946) (emphasis added). Competition between a government enterprise and private business can be restricted. See N.D.C.C. § 12-48-03.1 (prison industries). However, unless otherwise provided by law, the fact that a lawful government enterprise may compete with private business would not affect the statutory authority to engage in that enterprise. Letter from Attorney General Nicholas Spaeth to Jonathan Byers (November 18, 1991); see, e.g., N.D.C.C. chs. 6-09 (Bank of North Dakota), 54-18 (North Dakota Mill and Elevator). Therefore, it is my opinion that the Board can engage in authorized enterprises that may compete with private business.

This letter is limited to the questions asked by the Board and the expressed purpose of the joint powers agreement. It is not an approval of the specific terms of that agreement.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

jcf/vkk